IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	)	
	)	
ROBERTA JO SAUER,	)	**Case No. 00-20058**
	)	
	)	**MEMORANDUM OF DECISION**
	)	**AND ORDER**
Debtor.	)	
_____	)	

HONORABLE TERRY L. MYERS, UNITED STATES BANKRUPTCY JUDGE

Kenneth L. Anderson, Lewiston, Idaho for Debtors.

Gary L. McClendon, Office of the U. S. Trustee, Boise, Idaho.

C. Barry Zimmerman, Coeur d'Alene, Idaho, chapter 13 Trustee.

INTRODUCTION

The United States Trustee ("UST") has moved for entry of an order changing the venue of this chapter 13 case and transferring it to the Bankruptcy Court for the Eastern District of Washington or, alternatively, dismissing the case. Hearing on the motion was held in Moscow, Idaho on May 31, 2000 and the Court took the matter under advisement. This decision constitutes the Court's findings of fact and conclusions of law. Fed.R.Bankr.P. 9014, 7052.

BACKGROUND

The petition, and facts concerning the Debtor

Roberta Jo Sauer ("Debtor") filed a voluntary chapter 13 petition with this Court on January 21, 2000. Debtor resides in Pullman, Washington. Her petition discloses this address, and her county of residence is shown as "Whitman" though the state of residence is undisclosed. There is no dispute that Whitman County is in Washington.

The petition, Official Form No. 1, has a section concerning venue, which states:

> **Information Regarding the Debtor (Check the Applicable Boxes)**
>
> **Venue** (Check any applicable box)
>
> ❑ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.
>
> ❑ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

It appears that initially the Debtor checked the first box but later deleted this response by erasure or correcting fluid thus leaving both boxes blank. Debtor signed the petition, as did her attorney, Mr. Anderson ("Counsel").

The record establishes that Debtor has no principal place of business, principal assets, residence or domicile in the District of Idaho. There is no related bankruptcy case of any affiliate, partner or general partnership in this District.

Debtor admits that the petition was filed in the District of Idaho solely for her convenience. She lives in Pullman, a town 8 miles west of Moscow, Idaho. This Court holds hearings in Moscow, and the Trustee conducts § 341 meetings and examinations in

Moscow.[1] Debtor asserts, without contradiction by the Trustee or the UST, that the hearing location for Debtor in the Eastern District of Washington would be in Spokane, Washington, which is approximately 75 miles north of Pullman.[2] She alleges that would incur greater out-of-pocket expense, and require more time off work for required bankruptcy appearances, if the case were heard in Spokane. She clearly prefers that her case be heard in Moscow.

The "quirks of geography"[3]

Venue issue arises with some regularity in northern Idaho due to the existence of "sister cities" along the Idaho-Washington border. Lewiston, Idaho and Clarkston, Washington are but a few miles apart at the confluence of the Snake and Clearwater Rivers. Eight miles separate Moscow, Idaho and Pullman, Washington, two smaller towns in the Palouse region approximately 30 miles further north. While towns across a state line from one another are not uncommon around the country, and even in north

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[1] This Court's "Central Division" covers the Idaho Counties of Clearwater, Idaho, Latah, Lewis and Nez Perce, and holds hearings in Moscow for cases originating in those Counties. The "Northern Division" covers Benewah, Bonner, Boundary, Kootenai and Shoshone Counties, and hearings are held in Coeur d'Alene. *See*, General Order No. 158; Advisory Committee Notes to Local Bankruptcy Rule 5005.1.

[2] This representation has been confirmed by the Court's review of the website for the Eastern District of Washington which contains its Local Bankruptcy Rules. Rule 1072-1(a) states:

> Courtroom hearings are regularly held in Spokane, Yakima and Richland and occasionally in Ephrata for the convenience of the parties.

[3] This phrase comes from *In re Petrie*, 142 B.R. 404, 407 (Bankr. D. Nevada 1992).

Idaho,[4] the Lewiston-Clarkston and Moscow-Pullman situations are different. While they share the commingling of social and economic life and a community of interest typical of such closely situated towns, all four are remote from larger cities. Of the four, bankruptcy court hearings are regularly held only in Moscow. For residents of Pullman, Clarkston, Asotin, Colfax and numerous even smaller Washington towns, Moscow is a physically closer site for Court hearings than Spokane or other sites in the Eastern District of Washington.

Thus residents of these towns may be motivated solely for their own convenience and economic interests to seek to file in the District of Idaho.[5] This is a process not discouraged by some Idaho lawyers.

The history of this case

[4] For example, Coeur d'Alene, Idaho is some 30 miles to the east of Spokane, Washington. However, similar venue issues have not arisen in this area, in all likelihood because this Court sits in Coeur d'Alene on a regular basis, and the Bankruptcy Court for the Eastern District of Washington has a resident judge and facilities in Spokane.

[5] The parties have not argued that any other considerations were involved in Debtor's selection of the Idaho Bankruptcy Court over Washington's. However there are always differences between districts, for example in regard to availability of exemptions; applicable precedent construing Code provisions; local court rules and unwritten local practices; who will be appointed trustee; even who will be the judge. Any or all might give a particular debtor a reason to engage in forum shopping as between proper venues, or even attempt to file in an improper venue. But none are implicated here.

Debtor's chapter 13 case was filed on January 21. Trustee was appointed five days later. Debtor's proposed chapter 13 plan was also filed on January 21. It complies with the form plan required in this District. Under Local Bankruptcy Rule 2002.5, objections to confirmation were due not later than 5 days after the § 341(a) meeting of creditors. That meeting was scheduled for, and actually held on, March 3.

Less than a dozen creditors are scheduled. They received the proposed plan and the standard notice, Official Form 9, advising them of the filing, the scheduled first meeting, the bar date for confirmation objections, the claim bar date, and a prescheduled April 19 hearing date for confirmation in the event the plan was not automatically confirmed after the first meeting.

An amended plan was filed by Debtor on March 10. Creditors were provided express notice by Debtor of the April 19 hearing on confirmation of this amended plan. No objections to confirmation have been filed by any creditor or party in interest.

On April 14, the UST made its motion to change the venue of the case or, alternatively, to dismiss for improper venue. The UST scheduled a May 10 hearing on the motion. The venue issue was identified at the April 19 hearing, and confirmation was continued until this issue was briefed, argued and resolved.

ARGUMENT

Debtor argues that the motion of the UST is neither sufficient nor timely, and should be denied.

In regard to the sufficiency of the motion, Debtor contends that her filing in Idaho is proper and unobjectionable, and that Debtor's convenience is a legitimate consideration even if venue would otherwise be lacking. Tacitly, Debtor argues that the Court has the discretion to retain improperly venued cases, and is not limited to the options of dismissal or transfer to another district.

Debtor also contends the motion is untimely since it was filed on the eve of confirmation. She argues that this prejudices her, the Trustee, and creditors.

DISPOSITION

A. Sufficiency of the UST's motion.

In resolving these questions, the Court must start with the language of the statute. Section 1408 of Title 28, U.S. Code, provides:

> **Venue of cases under Title 11**
>
> Except as provided in § 1410 of this title, a case under title 11 may be commenced in the district court for the district –
>
> (1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other District, or
>
> (2) in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership.

The statute itself provides no basis for concluding that its terms are discretionary, or that a debtor may elect to file – for whatever reason – in an improper District where venue is lacking. Indeed, the Rules suggest strongly to the contrary, as they tell the Court how to deal with cases filed in the "proper district" and cases filed in an "improper district":

> **Rule 1014. Dismissal and Change of Venue**
>
> **(a) DISMISSAL AND TRANSFER OF CASES.**
>
> (1) *Cases Filed in Proper District.* If a petition is filed in a proper district, on timely motion of a party in interest, and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, the case may be transferred to any other district if the court determines that the transfer is in the interest of justice or for the convenience of the parties.
>
> (2) *Cases Filed in Improper District.* If a petition is filed in an improper district, on timely motion of a party interest and after hearing on notice to the petitioner, the United States trustee, and other entities as directed by the court, the case may be dismissed or transferred to any other district if the court determines that transfer is in the interest of justice or for the convenience of the parties.

Fed.R.Bankr.P. 1014.

If one accepts Debtor's argument that venue is a matter of "mere convenience," there would be no such thing as an "improper" district. Thus there would be no reason for both subdivisions of Rule 1014(a) to exist, since their change of venue provisions are identical and they differ only in that a case originally filed in an "improper district" is also subject to dismissal. Rule 1014(a)(2).

The statute and the rules do not support Debtor's contentions.

From the statute, the focus turns to the case law. Debtor argues that it is acceptable under the law to file a case in an improper district purely for the sake of convenience. Her Counsel submits:

> Even a cursory review of the language of the statute, the Advisory Committee's notes [to Fed.R.Bankr.P. 1014], and the caselaw indicate that proper venue is not an integral requirement of a case. It is a statute designed to protect the convenience of the parties.

Debtor's Brief, at p.4

In support of this position Counsel has cited only one case, which the Court finds distinguishable,[6] and committee notes that simply don't go as far as Counsel believes they do.[7] Counsel at hearing admitted he had no other authority to proffer. Despite the weakness of this affirmative showing, what is not addressed by Debtor is even more striking.

This Court held in *In re Thornberry*, 90 I.B.C.R. 129 (Bankr. D. Idaho 1990) that a filing by residents of Clarkston, Washington, made without proof that any of the factors of § 1408 were met, was improper and that, under Rule 1014(a)(2), the case

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[6] This case, *Hunt v. Bankers Trust Co.*, 799 F.2d 1060 (5th Cir. 1986), essentially stands for the proposition that objection to improper venue may be waived by a party's acts or conduct. While this relates to the question of the timeliness of the UST's motion (though this Court might view it more as a matter of estoppel rather than "waiver"), it does not support the initial improper filing.

[7] The Committee Notes to the 1987 amendments to Rule 1014 cited by Counsel actually hurt Debtor rather than help her. These notes reflect that the amendments deleted reference to any ability of the court to retain a case commenced in an improper district, and added the option of dismissal. To the extent the notes acknowledge the possibility of waiver of the right to object to improper venue, they add nothing to *Hunt*.

had to be either dismissed or transferred. *Thornberry* has never been expressly or implicitly overruled, and it establishes the law in this District. Counsel was duty-bound to identify and address this settled law in urging the proposition advanced here. He did not do so.[8]

That *Thornberry* remains good law is reflected by *In re Corona*, Case No. 00-00200 decided April 21, 2000 and, as yet, unpublished. In *Corona*, Chief Judge Jim D. Pappas stated:

> Rule 1014 leaves a bankruptcy court with but two options when faced with a case filed in the wrong venue: to dismiss the case; or to transfer the case to another district. *In re Thornberry*, 90 I.B.C.R. 129 (Bankr. D. Idaho 1990). *See also In re Petrie*, 142 B.R. 404, 405-06 (Bankr. D. Nevada 1992) (although there is a split of authority, the majority of courts hold that a court cannot retain an improperly venued case over an objection of a party in interest).
>
> In *Petrie*, the court recognized "that, on occasion, quirks of geography ... make it necessary for a case to be heard in the closest court, even if that court is in another state." *In re Petrie*, 142 B.R. at 407. However, the *Petrie* court went on to hold that it is the role of the "home court" or district in which venue is proper, to determine whether a change of venue is appropriate under 28 U.S.C. § 1412.

*Id., a*t 2-3.

That § 1408 would be closely reviewed and followed by this Court should not come as any surprise to Counsel, who was involved in *In re Andrews*, 225 B.R. 485, 98.4 I.B.C.R. 93 (Bankr. D. Idaho 1998). While that case presented a situation where

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[8] Counsel, by signing and presenting Debtor's petition and his brief in opposition to the UST's motion, made certain representations and certifications under Fed.R.Bankr.P. 9011(b)(1) - (4). Counsel thus exposes himself to serious consequences. *See*, Rule 9011(c).

one of two joint debtors was allegedly domiciled in this District while the other lived in Clarkston, and while it primarily dealt with exemption questions, the Court strictly applied the venue factors announced in the statute.[9]

Debtor has failed to provide competent and persuasive authority for the proposition that she may elect to file in an improper district, for the reason of convenience or otherwise. She failed to address controlling authority to the contrary. Given the state of the law in this District, the burden is squarely upon Debtor to persuade the Court that its prior approach is in error, and that legitimate authority supports a contrary result.[10] No credible attempt to comply with this obligation has been made. The UST's motion is clearly sufficient, under Rule 1014(a)(2), as the evidence in the record supports a finding that this case has been filed in an improper venue, and the law supports the request to transfer or dismiss the case for that reason.[11]

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[9] Counsel was also the attorney for the debtor in *In re Mitchell*, 99.2 I.B.C.R. 49 (Bankr. D. Idaho 1999), in which the Court expressly reserved the ability to consider venue questions such as that now presented here. *Id.*, at n. 2.

[10] *See DeBoer,* 99.3 I.B.C.R. at 102-03.

[11] Under *Corona*, *Thornberry,* and Rule 1014(a)(2), a case filed by a debtor in an "improper district" is subject to either dismissal or transfer. *See also, In re Hall, Bayoutree Associates,* 939 F.2d 802, 805 (9th Cir. 1991); *In re Handel*, 240 B.R. 798, 800 (1st Cir. BAP 1999); *In re Sorrells,* 218 B.R. 580, 586 (10th Cir. BAP 1998); *In re Land,* 215 B.R. 398, 403 (8th Cir. BAP 1997).

B. Timeliness of the UST's motion

Federal Rule of Bankruptcy Procedure 1014(a)(2) also requires a "timely" motion to dismiss or transfer venue. The Court has been unable to locate any provision of the Code or Rules that establishes a hard and fast deadline for such a motion. Timeliness must, therefore, relate to the totality of the facts and circumstances of the case. *In re Blagg*, 223 B.R. 797, 802 (10th Cir. 1998).

The UST admits that, if events in a given case have progressed to the point of confirmation (in a reorganization or chapter 13) or discharge (in a chapter 7), a motion under Rule 1014(a)(2) would likely be untimely. But the UST argues that a motion alleging improper venue is timely if raised before such a watershed event.

For example, the UST contends that such a motion could reasonably be delayed until after the first meeting of creditors under § 341(a) because that meeting is used by creditors, the trustee and parties in interest to investigate a debtor's affairs, and this could include inquiring as to a basis for venue under § 1408 not readily apparent from the petition itself. The Court agrees, as does the Court in *Blagg*. *See*, 223 B.R. at 802.

Of course, that does not necessarily require parties to wait until after the first meeting. Here, for example, the petition was clear on its face that the residence address of Debtor was in Pullman, Washington. The Trustee and UST were provided that information from the very outset of the case. There is no contention that Debtor concealed anything relevant to this issue, or that facts needed to be developed or uncovered before the motion could be filed. Nothing prohibits a trustee from simply

calling and asking a debtor or counsel to explain the basis for asserted venue, and this could and perhaps should occur prior to the first meeting.

The Court does not find here, nor does it require as a general matter, that the motion needs to be filed immediately upon receipt of the petition, before the first meeting, or within some set period after the first meeting.[12] The issue must be evaluated on a case-by-case basis in consideration of all relevant facts and circumstances.

Here the motion was filed on the eve of the April 19 hearing. Nothing is proffered to justify the delay in raising the issue, whether from the January 21 petition to the March 3 first meeting, or from March 3 to April 14 when the motion was lodged.

The issue of Washington border town filings in northern Idaho is not new or novel. Debtor's Counsel and the UST's attorneys are familiar with the issue, and they have debated it with one another before. There is no apparent reason why the venue issue could not have been raised well before the process of confirmation was nearly complete. The delay impacts most significantly Debtor, who would be forced through a second chapter 13 process should the case be either dismissed and

refiled or transferred to the Washington court. The Court notes that no creditors have resisted confirmation of the plan, and the concerns of the Trustee have all been resolved except for the venue issue raised by the UST.

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[12] However, recall that under this District's L.B.R. 2002.3 the chapter 13 plan could have been confirmed without hearing shortly after the March 3 first meeting if no objections were raised. That Debtor needed to amend and actually go to hearing on April 19 was a boon to the UST. The creditor in *Mitchell*, 99.2 I.B.C.R. at 51, benefitted from a similar fortuitous situation.

The Court thus finds upon the entirety of the record that the motion of the UST was not "timely" under Rule 1014(a)(2).

Despite the untimeliness of a party's motion or objection, the Court has the ability under § 105(a)[13] to raise the issue of improper venue *sua sponte*. It elects not to do so in this case. That decision is based primarily on the absence of any indication that Debtor had ulterior motives for filing in Idaho or is attempting to manipulate the Code to the prejudice of creditors. The Court has no reason to believe that Debtor has done anything other than merely rely upon and follow her attorney's legal advice about the propriety of filing in Idaho.[14]

CONCLUSION

The Court finds and holds that § 1408 does, should and must control the question of venue. The commands of § 1408 are not merely suggestions. A person or entity may properly file in this District only if the residence, domicile, principal place of business or

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[13] Section 105(a) states in pertinent part:

> No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

[14] This conclusion, of course, would not inhibit the Court in future cases from ordering dismissal or transfer of an improperly venued case, either *sua sponte* or on timely request by a party, and to do so regardless of the economic consequences on the debtor. An intentional filing in an improper district would not appear likely to engender much sympathy for a debtor who then argues that he shouldn't suffer the consequences of dismissal or transfer, especially after the venue question has again been clarified in *Corona* and here. In addition, it is fair to observe that dismissal appears a far more likely consequence than transfer for such an intentionally misfiled case. Liberally allowing transfer of improperly filed cases invites debtors to ignore or flaunt the requirements of § 1408.

principal assets of such person or entity are located in this District for the 180 days immediately preceding filing of the petition, or for a greater part of that 180 day period than in any other district.

If such a potential debtor resides or is domiciled in Pullman, Clarkston, or other nearby Washington locations, or has its principal assets or place of business in such locations for the requisite period of time, then the case should be filed in the Eastern District of Washington. If the interests of justice or convenience of the parties support a transfer to the District of Idaho, a debtor is free to ask the Washington Bankruptcy Court for a change of venue under § 1412 and Rule 1014(a)(1). But the decision on changing venue to Idaho is for that Court to make, not this Court, and it certainly is not for debtors to make unilaterally.

Accordingly, those finding themselves in the circumstances of the Debtor here may not "elect" to file in this District. Such a filing is improper, and would warrant dismissal or transfer, as would have occurred here but for the fact the UST's motion was not timely filed.

ORDER

The motion of the UST is DENIED. The March 10 amended plan of Debtor may proceed to confirmation hearing at the next available opportunity. Alternatively, given the present record, the Court will entertain confirmation upon submission of an order endorsed by the Trustee and Debtor's counsel.

Dated this 8th day of June, 2000.